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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-266

STEPHEN J. BORYS,

Petitioner,

—against—

THE UNITED STATES,

Respondent,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITION FOR CERTIORARI

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Opinion Below

The opinion of the United States Court of Claims on petitioner's motion for summary judgment and respondent's cross-motion for summary judgment is unreported and set forth in the Appendix, *infra*, at pp. A1 to A17.

Jurisdiction

The decision of the United States Court of Claims was dated and entered on May 11, 1973.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1255.

Questions Presented

1. Whether the time spent on active duty, at the insistence of the United States and against the will of an officer, allegedly after the officer should have been discharged, may be computed as creditable time for the purpose of retirement:

(a) If said officer has served over twenty years in the United States Army, and

(b) If said officer was granted an Honorable Discharge at the conclusion of his active duty.

2. Whether the time spent by an officer while held in prison by civilian authorities may be computed as creditable time for the purpose of pay and retirement:

(a) If said officer was acquitted of the civilian charges, and

(b) If the only investigation conducted by the United States Army was the one pursuant to 10 U.S.C. § 832 to determine whether the said officer should be tried for alleged crimes by a general court martial.

Statutory Provisions

The applicable statutory provisions are set forth in the Appendix, *infra*, at pp. A17 to A22, and are:

10 U.S.C. § 3303
10 U.S.C. § 101(22) (24) (30)
10 U.S.C. § 3926
10 U.S.C. § 801 et seq. [not reprinted in Appendix]
10 U.S.C. § 832
37 U.S.C. § 503
Army Regulation 37-104, Chapter 1, § 10106

Statement of the Case

The statement submitted herewith is the agreed Statement of Facts submitted to the Court by the parties to the action and is taken from the decision of the Court of Claims set forth in the Appendix, infra, at pp. A1 to A17.

Plaintiff is a former officer of the United States Army. Plaintiff enlisted in the Regular Army on March 21, 1949, and was commissioned as a Second Lieutenant upon graduation from OCS on September 23, 1949. On October 17, 1952, plaintiff accepted an appointment in the Regular Army as a Second Lieutenant, was promoted to First Lieutenant on December 30, 1952, and to Captain, Regular Army, on December 14, 1956.

On June 24, 1963, plaintiff was notified that a Regular Army promotion selection board, convened to consider Regular Army captains for permanent promotion to the grade of major, had not selected him and that as a result thereof he had become a "deferred officer" within the meaning of 10 U.S.C. § 3303. Under the provisions of 10 U.S.C. § 3303(c), plaintiff's name was required to be considered by the next selection board.

On June 25, 1963, while stationed at Fort Gordon, Georgia, and on an ordinary leave of absence, plaintiff was arrested by civilian police authorities in Richmond County, Georgia, and charged with various civilian crimes. Plaintiff was incarcerated in Georgia until July 26, 1963, when he was removed to the State of South Carolina, where he was charged with various civilian crimes and again incarcerated. On January 30, 1964, plaintiff was acquitted of certain of such crimes after a second [sic] jury trial in Aiken County, South Carolina. (On May 19, 1964, petitioner was

acquitted of certain of such crimes after a second jury trial in Aiken County, South Carolina.)[1] On June 19, 1964, plaintiff was released from the custody of the State of South Carolina and returned to military control at Fort Gordon, Georgia, his regularly assigned military post. On June 22, 1964, plaintiff was restricted to certain areas of Fort Gordon, pending an investigation under Article 32 of the Uniform Code of Military Justice. Prior to the just described events commencing June 25, 1963, plaintiff was entitled to an allowance of $105.00 a month for quarters, known as "Bachelor Allowance for Quarters".

Flagging action was initiated on plaintiff on June 25, 1963, pursuant to the provisions of § III, AR 600-31, to preclude favorable personnel actions pending investigation of charges by military authorities for alleged violations of the Uniform Code of Military Justice. Plaintiff's records were presented to a Regular Army promotion selection board convened on February 6, 1964, and plaintiff was notified, by letter dated March 2, 1964, that he had been non-selected for the grade of major for the second time. This being plaintiff's second non-selection, plaintiff became subject to the provisions of 10 U.S.C. § 3303(d), which required his discharge (as he was not eligible for retirement) no later than the first day of the seventh calendar month after the report of the selection board was approved. Plaintiff was notified by letter dated July 20, 1964, that he would be honorably discharged on January 1, 1965, with 15 years, 3 months, 9 days' creditable service. On August 10, 1964, plaintiff protested the placement of his records before the promotion board as they were subject to flagging action.

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[1] Sentence in parenthesis left out of Court of Claims decision but in original agreed upon Statement of Facts.

Plaintiff was not discharged on January 1, 1965, as prior to that date nine charges, including three capital charges and thirty-two specifications, were referred to a general court-martial whose action took precedence over plaintiff's mandatory discharge under 10 U.S.C. § 3303. On October 19, 1964, a general court-martial was convened for the purpose of trying plaintiff for alleged violations of the Uniform Code of Military Justice. On January 23, 1965, plaintiff was convicted and sentenced to be dismissed from the service, to forfeit all pay and allowances, and to be confined at hard labor for 60 years. On February 5, 1965, plaintiff was transferred to the United States Army Disciplinary Barracks at Fort Leavenworth, Kansas, for the purpose of serving his sentence. His case was reviewed by a Board of Review which, on April 12, 1966, set aside the findings and sentence and ordered a rehearing. On May 19, 1966, plaintiff was transferred to Fort Gordon, Georgia, and confined there. On July 25, 1966, a second court-martial was convened and, on August 2, 1966, plaintiff was again found guilty, and the same sentence imposed. On August 3, 1966, plaintiff was returned to Fort Leavenworth to serve such sentence. On July 12, 1968, a Board of Review affirmed plaintiff's conviction, but reduced the confinement to 30 years at hard labor.

On September 5, 1969, the United States Court of Military Appeals reversed plaintiff's conviction and ordered all military charges against him dismissed. The court's decision, found at 18 U.S.C.M.A. 547, 40 CMR 259 (1969), was based upon the ground that the court-martial lacked jurisdiction over civilian crimes. On September 22, 1969, the Department of the Army ordered plaintiff returned to active duty with restoration of all rights, privileges and property of which he had been deprived as a result of the previous

conviction. On that date, plaintiff was released from the United States Army Disciplinary Barracks, Fort Leavenworth, Kansas, and assigned to duty at Fort Sheridan, Illinois. During the period of his confinement at Fort Leavenworth, plaintiff was charged a surcharge for every meal he consumed.

On September 23, 1969, plaintiff was notified by the Army of his pending discharge from the Regular Army under the authority of 10 U.S.C. § 3303, and that he would receive severance pay computed on the basis of 15 years, 3 months, 9 days' service, together with all pay and allowances of which he had been deprived as a result of the court-martial sentence.

On October 1, 1969, plaintiff was honorably discharged from the Army and his service was computed as follows:

	(Yrs.)	*(Mos.)*	*(Days)*
Net Service This Period	15	3	19
Other Service	4	8	21
Total	20	0	10
Total Active Service	15	3	19

The Army designated 4 years, 8 months and 21 days of plaintiff's civilian and military confinement as "other service" and excluded same from the computation of total services creditable to plaintiff. Upon discharge, plaintiff was paid for 60 days of accrued leave. By letter dated October 1, 1969, plaintiff notified the Army of his objection to his discharge action and the computation of his creditable service for retirement.

On December 12, 1969, plaintiff applied to the United States Army Board for the Correction of Military Records for the correction of his records to reflect a total of 20 years, 0 months, 10 days' service, on the basis of continuous active

service from March 21, 1949 to October 1, 1969: alleged entitlement to back pay and allowances for the period June 25, 1963 to June 19, 1964, during which time he was absent in the hands of civil authorities and which absence the Army has consistently refused to excuse as unavoidable; and reimbursement for denied leave. On September 9, 1970, such Board denied plaintiff's application. Plaintiff filed his petition in the Court of Claims on May 4, 1971.

The following is an additional Statement of Facts not part of the agreed Statement of Facts:

It would appear that the only service designated by the respondent as "other service" and excluded from the computation of total service creditable to petitioner, was the service from January 1, 1965 through September 21, 1969. Respondent credited petitioner with all service up to January 1, 1965, including the time spent while incarcerated by civilian authorities, namely June 25, 1963, through June 19, 1964, but did not pay him for such time. Due to poor mathematics on the part of counsel for both sides, argument in the United States Court of Claims indicated that petitioner did not receive credit for retirement purposes for such time. Since the United States Court of Claims discussed this time as though no credit was given, this petition will set forth the points for such 11 months and 24 days for both pay and credit for retirement purposes.

Reasons for Granting the Writ

A. The decision of the United States Court of Claims is directly counter to the plain meaning of the statutes governing pay and retirement benefits for members of the Armed Forces

The decision of the United States Court of Claims states that the United States acted properly in not crediting for retirement purposes the period from January 1, 1965 to

September 21, 1969, namely the period that respondent claims petitioner should have been discharged until he was restored to active duty by respondent on September 22, 1969. Respondent paid petitioner for this period and granted to him the allowances he was entitled to. The United States Court of Claims stated that while petitioner was confined by the military [he] ". . . did not perform any active service on active duty in the active military service of the United States . . .". This is clearly contrary to the statutes covering the subject matter.

10 U.S.C. § 101, pertinent portions of which are set forth in the Appendix, infra, at pp. A17 to A18, provides that " 'active duty' means full-time duty in the active military service of the United States: It includes . . ." [followed by a list of included activities] Respondent, for pay and allowances purposes, has already recognized that petitioner was on active duty. Congress had clearly recognized that there were other situations that fall under "active duty". Note 10 U.S.C. § 101, sub-paragraph 30, which clearly indicates that the word "includes" was not all-inclusive. Hospitalization of a member of the Army or time while such member is on leave, clearly would be "active duty" and of course the present situation where a member of the services is involuntarily held by the service, must be one where Congress did not mean to exclude such time from computation for all purposes including retirement benefits.

10 U.S.C. § 3926, which is set forth in the Appendix, *infra*, at p. A18, uses the words "all active service performed as a member of the Army or Air Force" as the time that may be computed for the purpose of voluntary retirement. This Court, in *Bell*, v. *United States*, 366 U.S. 393, discussed many of the principles applicable to this case and the following quotes illustrate the errors made by the United States Court of Claims:

"*A soldier's entitlement to pay is dependent upon statutory right.* In the Armed Forces, as everywhere else, there are good men and rascals, courageous men and cowards, honest men and cheats. If a soldier's conduct falls below a specified level he is subject to discipline, and his punishment may include the forfeiture of future but not of accrued pay. But a soldier who has not received such a punishment from a duly constituted court-martial is entitled to the statutory pay and allowances of his grade and status, however ignoble a soldier he may be..."

(at p. 401) [emphasis supplied]

"This principle has received consistent recognition in the Court of Claims. "It would, we think, be an anomalous proceeding to permit resort to the courts to ascertain whether, under all the various provisions with respect to pay and allowances of officers and men of the Army, Navy and Marine Corps, investigations should obtain to determine as a matter of fact whether the soldier involved had by conscientious service earned what the statutes allow him." White v. United States, 72 Ct.Cl. 459, 468.

(at p. 404)

[T]he mere fact that an officer or soldier is under charges does not deprive him of his pay and allowances, * * * such forfeiture can only be imposed by the sentence of a lawful court-martial." Walsh v. United States, 43 Ct.Cl. 225, 231." (At p. 404)

"The argument that it was open to the Secretary of the Army to determine that the petitioners in the prison camps to which they were taken were thereafter not 'in the active service' cannot survive even cursory analysis. In the Armed Forces the term 'active service' has a precise meaning, a meaning not

> dependent upon individual conduct. 10 U.S.C. § 101, 10 U.S.C.A. § 101. Moreover, the verbal structure of the Act, re-enforced by common sense, clearly leads to the conclusion that 'active service' refers to a person's status at the time he became missing. Nothing in the legislative history of the original statute or of its many re-enactments offers support for any other construction." (At p. 410)

It should also be noted that in § 24 of 10 U.S.C. 101 "active service" means service on active duty. It is apparent from the above that petitioner should have been credited with all time from January 1, 1965 (the date respondent states it should have discharged petitioner) to September 22, 1969, (the date petitioner was restored to duty).

B. The decision of the United States Court of Claims is in error in not allowing any time after January 1, 1965 to be computed for retirement purposes.

The United States Court of Claims was in error by deciding that the respondent, being required to discharge petitioner on January 1, 1965 pursuant to 10 U.S.C. §3303 (d) (3), which is set forth in the Appendix, *infra*, at pp. A18 to A20, could not credit for retirement purposes any time served by the petitioner after January 1, 1965.[2] The United States Court of Claims has taken the position that petitioner, who, according to respondent, should have been discharged on January 1, 1965 but was retained on active duty by respondent pursuant to 10 U.S.C. § 801, et seq. for the purposes of court martial jurisdiction, is not entitled to compute time after January 1, 1965 for the purpose of retirement. It was not a voluntary act of the petitioner

[2] Respondent did not have any inhibition in crediting the 8 days from September 22, 1969 to October 1, 1969 as total active service even though that time was after the January 1, 1965, cut-off date relied upon by respondent.

to stay on active duty. It is a fair assumption that if he had been given the choice, on January 1, 1965, he would have left the service of the United States Army. It is inconceivable that Congress, in enacting 10 U.S.C. 3303(d)(3), intended to take away any rights from the serviceman who is involuntarily held on active duty by the respondent.[3] The Comptroller General, in 43 Comp. Gen. 4372, held that an officer who is required by law to be retired on a certain date but was retained beyond such mandatory retirement date for hospital examination could not be credited with the additional period of service after the mandatory retirement date in computing his retirement pay. The service member received a benefit from retention. As Judge Davis, of the United States Court of Claims stated, in his concurring opinion in this case:

"The first reason the opinion gives for not counting 'the court-martial period' toward retirement seems to me quite wrong in a case, like this, in which the court-martial determination is entirely quashed (or the accused is acquitted). At least in those circumstances the period of confinement is 'active duty' or 'active service' ".

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[3] The Court's attention is also called to 10 U.S.C. § 676, which reads as follows:

> *Retention after becoming qualified for retired pay*
>
> Any person who has qualified for retired pay under chapter 67 of this title may, with his consent and by order of the Secretary concerned, be retained on active duty, or in service in a reserve component other than that listed in section 1332(b) of this title. A member so retained shall be credited with that service for all purposes.

This section indicates that Congress could not ever have contemplated the situation that is present herein but always expected that even a person who is retired should receive credit for any service he performs thereafter, for all purposes. It should be noted that in the section quoted above, a reservist, with his consent and by order of the Secretary, could serve on active duty and get full credit for such service. Congress could not have intended that a person who serves on active duty without his consent but by direction of the Secretary concerned, is not entitled to at least equal benefits.

"The second reason expressed by the court raises a difficult problem which we should let go until it has to be resolved. I am not at all sure whether the rule applicable to extended service for hospitalization or like purposes beneficial to the serviceman should apply where the man is held over for a court-martial, and is then acquitted or (as here) freed because there was no court-martial jurisdiction. In that situation the holding-over is not for the serviceman's benefit, and it may well be that *he should be credited with the extra time he was forced to spend in the military for the unilateral purposes of the service*" (Appendix, pp. A-15 to A-16). [emphasis supplied]

Respondent made a choice in regard to petitioner in 1964. The choice was to try him for alleged crimes. That choice also included the unilateral decision by respondent that petitioner should not be discharged on January 1, 1965, and no discharge order was issued by respondent on January 1, 1965. It is clearly erroneous, against the plain meaning of the statutes involved and inequitable to allow the following: respondent may hold petitioner on active duty for the purpose of trial of certain charges; such charges are dismissed and respondent orders petitioner returned to active duty with restoration of all rights, privileges and property; respondent now claims petitioner should have been discharged on January 1, 1965 and is not entitled to count those years for retirement purposes. Respondent made its decision, paid petitioner for his active duty, but then withheld from petitioner certain other rights as outlined above.

C. Respondent acted arbitrarily, capriciously and unlawfully in not excusing time spent while petitioner was held by the States of Georgia and South Carolina

Petitioner was held by the civilian authorities in Georgia and South Carolina on criminal charges, from June 25,

1963 to June 19, 1964. He was tried twice by the civilian courts in South Carolina and acquitted both times, released from confinement on June 19, 1964, and returned to his post. The only investigation that was held by respondent after petitioner's return to his post on June 19, 1964, was pursuant to 10 U.S.C. § 832, which is set forth in the Appendix, infra, at pp. A20 to A21. This investigation is commonly called the "Article 32" investigation and likened in many ways to a grand jury investigation. It has one purpose, namely, to reach a decision as to whether, after the investigation, the facts warrant a reference to a trial by a general court martial. It is concerned strictly with alleged criminal behavior on the part of the member of the Armed Forces and in no way is concerned with the questions as to whether the member's absence under 37 U.S.C. § 503, which is set forth in the Appendix, infra, p. A20, is excusable or not. Petitioner was physically restrained from reporting to his post by the authorities in Georgia and South Carolina and later released by such authorities after normal judicial processes had acquitted him of the charges for which he was held. The question to be determined upon his return to his post was whether the 11-month absence should be excused as unavoidable. Any investigation under 10 U.S.C. 832 would, by its very nature, avoid this question and would only be concerned as to whether the facts elicited at such investigation would warrant a trial by court martial.

Without a proper investigation the respondent is, of course acting arbitrarily, capriciously and unlawfully, since it had no basis upon which to make a decision as to whether the physical absence of the petitioner should be excused. There was no proper investigation as to the absence, itself, and the fact that the respondent tried petitioner after its Article 32 investigation in no way indicates

that petitioner's absence was to be excused or not. He was physically held by civilian authorities and unable to return to his post, tried by said civilian authorities and acquitted and freed. If petitioner had not been arrested by the civilian authorities and had reported back to his post on June 25, 1963, he would obviously be entitled to full pay and to credit for retirement purposes for the period involved even if later tried by respondent and convicted.

D. There was no jurisdiction for the investigation under 10 U.S.C. § 832.

Petitioner was restored to duty pursuant to a decision of the United States Court of Military Appeals. *United States* v. *Borys*, 18 U.S.C.M.A. 547, 40 C.M.R. 259 (1969) stated that his situation was governed by this Court's opinion in *O'Callahan* v. *Parker*, 395 U.S. 258. In that decision this Court was considering the following question:

> "Does a court-martial, held under the Articles of War, Tit. 10, U.S.C. § 801 et seq. have jurisdiction to try a member of the Armed Forces who is charged with commission of a crime cognizable in a civilian court and having no military significance, alleged to have been committed off-post and while on leave, thus depriving him of his constitutional rights to indictment by a grand jury and a trial by a petit jury in a civilian court?" 393 U.S. 822, 89 S.Ct. 177, 21 L.Ed.2d 93.

Clearly this Court was not limiting its decision to the fact that there was no jurisdiction on the part of the United States to court-martial an individual, but to the broader proposition that there was no jurisdiction for any purpose under 10 U.S.C. § 801 et seq. Therefore respondent could not use the results of an Article 32 investigation for any purpose when it had no jurisdiction in the first place to con-

luct an Article 32 investigation. Respondent acted arbitrarily, capriciously and unlawfully when it attempted to rely on such an investigation to make its decision under 37 U.S.C. § 503.

E. The United States Court of Claims was in error in allowing respondent to disregard its own regulation

Army Regulation 37-104, dated 15 February 1965, Ch. 1, § 10106, which is set forth in the Appendix, infra, at p. A-22,[4] provides for determination of "Absence while in Officer Status". Under that regulation petitioner, as a commissioned officer, could count the time while in an authorized or unauthorized absence as creditable service and respondent appended to that regulation a note: "See 38 Comp. Gen. 352", the text of which is attached hereto in the Appendix, infra, at p. A22.

Respondent, while seeking a ruling regarding that regulation, submitted to the Comptroller General a question as to whether commissioned officers, in determining creditable service for basic pay, retirement and other purposes, could include a period of absence while awaiting trial and whose conviction has become final, or who were acquitted. Petitioner was never convicted by civilian authorities and his military conviction never became final. The Comptroller General answered the questions affirmatively. Petitioner's situation is exactly the same as the one presented to the Comptroller General.

The United States Court of Claims did not deal with this point except in the concurring opinion of Judge Davis. The Court was in error since at the time of petitioner's arrest by

[4] This regulation is dated after the period in question but is the only copy available to petitioner. In the Court below the respondent submitted copies of the correct regulations but there was no indication that there was any material change in such regulation.

civilian authorities and throughout the time of his confinement both by military and civilian authorities, he and respondent were governed by the regulation cited above which incorporated the decision of the Comptroller General. To allow respondent to change horses in mid-stream, whatever the merits of such a change might be, is illegal and inequitable. Petitioner is entitled to be paid for the period June 25, 1963 through June 19, 1964, and to be able to compute for retirement purposes the entire period from June 25, 1963 through October 1, 1969, when he was honorably discharged from the United States Army which, parenthetically, is an indication of good and creditable service for the entire period in question.[5]

Conclusion

The United States Court of Claims was in error for the reasons stated above and petitioner, (along with other members of the Armed Forces in similar situations) is entitled to full pay and allowances from the period beginning with his arrest by civilian and/or military authorities until the date of his honorable discharge. The petitioner is also entitled to the right to compute that entire period for the purposes of retirement.

WHEREFORE, it is respectfully requested that the instant petition for writ of certiorari to the United States Court of Claims be granted.

Respectfully submitted,

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Of Counsel
August 6, 1973

[5] As indicated previously, it appears that respondent has credited the time spent in civilian jail as good time but has not paid petitioner for such time.

APPENDIX

Decision and Opinion of The United States Court of Claims

#387-71

(Decided May 11, 1973)

Appearances

Before COWEN, *Chief Judge*, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG, and BENNETT, *Judges*.

ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT

SKELTON, *Judge*, delivered the opinion of the court:

The plaintiff, Stephen J. Borys, is a former captain in the U.S. Army. He has filed this suit to recover:

1. Retirement benefits based upon alleged active duty service of 20 years and 10 days;

2. Pay and allowances for the period from June 25, 1963, through June 19, 1964, while he was incarcerated in jail by civil authorities in Georgia and South Carolina charged with various civil crimes; and

3. An amount equal to the bachelor allowance for quarters from June 19, 1964, to October 1, 1969, during the time he was restricted to military quarters pending and during two court-martial trials and while confined to Fort Leavenworth Disciplinary Barracks under court-martial order.

The case is before us on cross motions for summary judgment. We have concluded that the plaintiff is not entitled to recover.

The parties have filed an agreed statement of facts as follows:

(Omitted from opinion but appears on pages 3 to 7 of petition)

The plaintiff contends that it was error for the Army to present his records to a Regular Army Promotion Selection Board at a time when his records had been "flagged." He says such action kept him from being promoted to major. He had been passed over for promotion the first time on June 24, 1963. This action caused him to become a "deferred officer" within the meaning of 10 U.S.C. § 3303. This statute required his name to be submitted to the next selection board. The plantiff was arrested by civilian authorities on June 25, 1963, and flagging action was initiated on his records by defendant in accordance with Army Regulation (AR) 600-31. Flagging action is defined in this regulation as "action initiated and maintained to preclude favorable personnel actions," which includes promotions. It is the policy of the Army to allow a flagged officer to be considered for promotion. This is governed by what is known as Deputy Chief of Staff for Personnel Policy Book —Promotion Rank and Procedure (DCSPER). Section IV of the DCSPER Policy Book states what information is furnished to selection boards and the information that is not furnished to them. In short, the "flag" is not an item that is furnished to the promotion selection board. Consequently, when the selection board considered plaintiff's records in 1964, it did not know of the flagging action and gave him the same consideration it gave other officers who were considered for promotion by the board. As a matter of fact, had plaintiff not been considered for promotion by this board in 1965, he would never have had another chance to be considered, because the promotion system of the Army

requires him to be considered with his peers. If this is not done, the next selection board would consider a different and younger group of officers and the plaintiff would not be among them. Each year the procedure is repeated. The only function of the flagging action is to hold up the promotion of an officer, if he is selected for promotion by the board, until the cause of the flag is removed. Thus the flag does not keep an officer from being selected for promotion by the board, as the board has no knowledge of the existence of the flag.

The plaintiff was passed over for promotion to major the second time by the selection board on February 6, 1964. Accordingly, 10 U.S.C. § 3303(d) required him to be discharged no later than the first day of the seventh calendar month after the report of the selection board was approved. The plaintiff was notified by letter dated July 20, 1964, that he would be honorably discharged on January 1, 1965, with 15 years, 3 months and 9 days creditable service.

We find no error in the foregoing proceedings in which the plaintiff was considered for promotion. The Army would have been required to have discharged him on January 1, 1965, had jurisdiction for court-martial proceedings against him not attached prior to that date.

The plaintiff contends that he should be paid active duty pay and allowances by the government during the time he was incarcerated by civil authorities in Georgia and South Carolina on criminal charges from June 25, 1963, through June 19, 1964, and that such time should be counted toward retirement. Unless his absence is excused as unavoidable, his claim for active duty pay and allowances during this period is directly contrary to 378 U.S.C. § 503, which provides:

§ 503. Absence without leave or over leave.

(a) A member of the Army, * * *, who is absent without leave or over leave, forfeits all pay and allowances for the period of that absence, unless it is excused as unavoidable.

The plaintiff requested the Army to excuse his absence during this period as unavoidable on four different occasions and his requests were refused on the following dates: March 22, 1965; May 22, 1967; April 19, 1969; and September 30, 1969. In its last denial on September 30, 1969, the Army stated:

1. On three previous occasions this headquarters has considered and denied your request to have your absence while in confinement by the State of South Carolina from 25 June 1963 until 19 June 1964, declared unavoidable.

2. The predicate for excusing an absence as unavoidable is the absence of misconduct, not a lack of criminal accountability. The record in your case is laden with plentiful evidence to support the conclusion that the absence was, in fact, due to your own misconduct. Considering all of the facts and circumstances surrounding your absence from duty during that period, the inescapable conclusion is that your absence was the direct result of your own misconduct, and therefore that absence will not be excused as unavoidable.

These refusals by the Army to excuse the absence of the plaintiff as unavoidable is in complete accord with Army Regulation 37-104, Section 12122, which provides:

SECTION C—ABSENCE IN THE HANDS OF CIVIL AUTHORITIES

* * * * *

> 12122. Confined Because of Civil Offense. a. *Confined by Civil Authorities.* A member who is charged with a civil offense and confined by civil authorities is in unauthorized absence (except for the part of the period covered by authorized leave). He is entitled to pay and allowances for the period of confinement only if his commander excuses the absence as unavoidable after results of the trial are known. Pay and allowances are not authorized unless so excused, regardless of the outcome of the civil proceedings. * * *

Also, "Section B—Unauthorized Absence," Section 12122, of AR 37-104 provides in pertinent part:

> * * * However, before an unauthorized absence legally may be excused as unavoidable under the statute, that absence not only must be unavoidable so far as the member is concerned but also must be unavoidable so far as the Government is concerned. * * *

The plaintiff argues that because he was tried and acquitted on two charges in South Carolina that the Army was required to excuse his absence as unavoidable. We do not agree. AR 37-104, Section 12124 provides that if a member is tried and acquitted, such circumstance is sufficient basis for excusing an absence as unavoidable. However, this provision is permissive only and not mandatory. See AR 37-104, Section 12122, quoted above, which provides that an excuse of unauthorized absence as unavoidable may be denied "regardless of the outcome of the civil proceedings." Furthermore, Section 12124 provides that if a member is released without trial on his agreement to make restitution or reparation for the offense, *and his commander determines that absence was not due to the member's mis-*

conduct, such circumstances is sufficient basis for excusing the absence as unavoidable. It will be remembered that the plaintiff was not tried for all of the alleged offenses in South Carolina and was not tried for any of those charged in Georgia. Decisions of the Comptroller General hold that not all absences are required to be excused after acquittal. *See* 8 Comp. Gen. 496 (1929); 21 Comp. Gen. 845 (1942); and 39 Comp. Gen. 781, 783 (1960), where it was held that "the basis for excusing absences should be an absence of misconduct rather than a lack of criminal culpability," and that absense due to a member's misconduct is not unavoidable. We agree with these principles.

Whether or not a member's absence should be excused as unavoidable is an administrative detemination made by the military authorities based on the facts involved in each case. It is a decision involving discretion and will not be disturbed by the courts in the absence of a showing that the decision was arbitrary, capricious, or unlawful. *See Muldonian* v. *United States*, 193 Ct. Cl. 99, 432 F. 2d 443 (1970); and *Krivoski* v. *United States*, 136 Ct. Cl. 451, 145 F. Supp. 239 (1956), *cert. denied*, 352 U.S. 954. The plaintiff tries to meet this requirement by saying that his two acquittals in civilian courts plus the dismissal of his court-martial conviction by the Court of Military Appeals in *United States* v. *Borys*, 18 U.S.C.M.A. 547, 40 C.M.R. 259 (1969) cleared him of all charges and as a result he must be considered innocent of the alleged crimes. We do not agree. The Court of Military Appeals did not clear him of all charges nor declare him innocent of them. On the other hand, the court considered him guilty of the crimes and spoke of "his vicious and depraved conduct" involving "purely civilian female victims, and constituted rape, robbery, sodomy, and attempts to commit such acts." The Court of Military Appeals dismissed the court-martial case

against the plaintiff on the ground of lack of jurisdiction over civilian crimes, based on the decision of the Supreme Court in *O'Callahan* v. *Parker*, 395 U.S. 258 (1969).

The military authorities made their own investigation of the plaintiff's crimes in order to determine whether his absence while confined in civilian jails should be excused as unavoidable, as well as for court-martial purposes. This was known as an Article 32 Investigation under the Uniform Code of Military Justice, 10 U.S.C. § 832. This investigation was most thorough, as shown by a copy of the report of same filed with the court. The investigator personally interviewed the female victims of plaintiff's crimes and took statements from them. These statements showed that plaintiff's offenses followed a consistent pattern. His practice was to gain entrance to a house at night where a woman was sleeping by breaking in if necessary. He usually wore tennis shoes and soft gloves. He would place a knife at the throat of his victim and awaken her. He would threaten to kill her if she refused to cooperate. He then required her to lie on her stomach while he tied her hands behind her back. Then he would demand and get her money and other valuables. This done, he would take off all of her clothes, fondle her person, and then require her to put on high heel shoes and do the "twist" in front of him. Finally, he would make her kneel in front of him and engage in oral sodomy on his person. One of his victims vomited while this was going on and he merely wiped it away and made her continue. The other details of what he made the victims do in the acts of sodomy are even more sickening and depraved than the above, and for that reason will not be detailed here. After the sodomy, he frequently raped the victim. The condition or age of the female made no difference to him. One woman was pregnant, another had a small child at her side. Two others were teenage

twins, 14 years of age, and another girl was under 16 years of age. During the commission of each offense, plaintiff used vulgar, obscene and gutter language pertaining to sex. The foregoing merely covers a part of the details of the Article 32 Investigation report. The report showed that the plaintiff had committed the following crimes in Georgia and South Carolina.

3 rapes
3 attempted rapes
3 burglaries
3 robberies
1 attempted sodomy
7 sodomies
1 felonious housebreaking
1 larceny
4 assaults
1 threat to kill

Some of these offenses were the same as those charged against the plaintiff by the civil authorities in Georgia and South Carolina and some were different. The report recommended that plaintiff be tried by general court-martial for the above crimes. From this report, can there be any doubt that the Army was justified in refusing to excuse plaintiff's absence as unavoidable while incarcerated for these crimes? We think not. It is easy to understand why he received sentences in two different court-martial trials of 60 years at hard labor with forfeiture of all pay and allowances.

We hold that the decision of the Army in refusing to excuse plaintiff's absence while incarcerated in civilian jails as unavoidable was neither arbitrary, capricious, nor unlawful and was supported by substantial evidence. Consequently, he forfeited all pay and allowances during such period as required by the statute and regulation.

The plaintiff argues that even if he forfeited his pay and allowances during the time he was incarcerated by civilian authorities from June 25, 1963, through June 19, 1964, such period must be credited to him for retirement purposes. We do not agree. He cites Chapter 1, Section 10106 of AR 37-104 in support of his claim. That chapter and section pertain only to "Service Creditable for Basic Pay." They do not mention retirement and are not relevant to the retirement problem before us. The plaintiff's rights to retired pay must be established by and under the retirement statutes and not by the statutes and regulations dealing with the computation of basic pay. The pertinent parts of the applicable retirement statutes are as follows:

> § 3926. Computation of years of service: voluntary retirement; regular and reserve commissioned officers.
>
> (a) For the purpose of determining whether an officer of the Army may be retired under section 3911, 3918, or 3924 of this title, his years of service are computed by adding—
>
> (1) all *active service* performed as a member of the Army or the Air Force; [Emphasis supplied.]
>
> • • • • •
>
> [10 U.S.C. § 3926 (1970).]
>
> § 3927. Computation of years of service; mandatory retirement; regular commissioned officers.
>
> (a) For the purpose of determining whether a regular commissioned officer may be retired under section 3913, 3915, 3916, 3919, 3921, 3922, or 3923 of this title, his years of service are the greater of—

> (1) the years of service credited to him at the time of his original appointment in the Regular Army to determine his eligibility for promotion, * * *, plus his years of *active commissioned service* in the Regular Army after that appointment; * * * [Emphasis supplied.]
>
> * * * * *
>
> [10 U.S.C. § 3927 (1970).]

We agree with the defendant that years of "active service" is the key element in these statutes. Title 10 U.S.C. § 101(24) defines "active service" as follows:

> (24) "Active service" means service on active duty.

The term "active duty" is defined in pertinent part in Section 101(22) of the same statute as follows:

> (22) "Active duty" means full-time duty in the active military service of the United States. It includes duty on the active list, * * *.

The same definitions are found in Title 37 U.S.C. § 101 (18) and (20).

It is our view that the plaintiff cannot meet the requirements of these statutes for retirement purposes insofar as counting the time he was incarcerated by civilian authorities is concerned. During the period of such incarceration, the plaintiff was physically unable to perform any duty for the Army, and did not actually perform any active service on a full time basis for the military during this period.

We hold that the plaintiff cannot count the period of his confinement by civilian authorities for retirement credit

purposes, because during that period he did not perform any active service on active duty in the active military service of the United States as required by the retirement statutes.

The plaintiff also contends that he should be able to count the period from June 19, 1964, to October 1, 1969, while he was confined by the military during the court-martial proceedings, for retirement credit purposes. It is not necessary for us to reach this question in view of our decision that the plaintiff cannot count the period of his confinement by civilian authorities for retirement purposes, because without being able to count that period, he does not have the necessary 20 years of active duty service required for retirement. However, since the plaintiff urges the point, we will discuss it briefly.

There are at least two reasons why plaintiff cannot count the court-martial period toward retirement. In the first place, in the special circumstances of this case, all of the analysis set forth above as to why he cannot count the civilian confinement period toward retirement applies with equal force to the court-martial period. While confined by the military, the plaintiff did not perform any active service on active duty in the active military service of the United States as required by the retirement statutes. Consequently, the period cannot be counted for retirement purposes.

In the second place, the major portion of the court-martial period, namely, from January 1, 1965, to October 1, 1969, cannot be counted for retirement purposes for the following reasons. When the plaintiff was passed over for promotion the second time, the Army was required to discharge him on January 1, 1965. *See* 10 U.S.C. § 3303(d)(3). However, before he could be discharged court-martial

jurisdiction attached and he was retained in the Army to answer the court-martial charges under the authority of 10 U.S.C. § 803, but not for active service on active duty. But even if it could be said that plaintiff's continued Army status during this period was Army service, it was not service that could be counted for retirement purposes. It has been held in several cases that Army service occurring after a member's mandatory date for retirement from the Army has passed is not creditable for retirement purposes. *See* 30 Comp. Gen. 195 (1950); 41 Comp. Gen. 375 (1961); 43 Comp. Gen. 742 (1964); and *Richard* v. *United States*, 136 Ct. Cl. 33, 152 F. Supp. 433 (1956). In 43 Comp. Gen. 742, the Comptroller General held that an officer who was required by law to be retired on a certain date, but who was retained beyond such mandatory retirement date for a hospital examination, could not be credited with the additional period of service after the mandatory retirement date in computing his retired pay. There it was held at 744:

> * * * The fact that the Army failed to accomplish his retirement on the date required by law would not seem to add to his rights in any way with respect to computing the amount of retired pay to which he is entitled.

We think this is the correct rule and should be applied here, as of January 1, 1965, the mandatory discharge date of plaintiff.

The one remaining claim of the plaintiff is his contention that he is entitled to be paid a Bachelor's Allowance for Quarters (BAQ) during the time of his confinement by the Army for the court-martial proceedings from June 19, 1964, to October 1, 1969. The defendant says plaintiff is not entitled to BAQ during this period under the facts and the law of this case. We agree. Title 37 U.S.C. § 403(b)

provides that a member is not entitled to BAQ if he is assigned to adequate quarters of the United States or a housing facility under its jurisdiction. Section B, Chapter 3, Army Regulation 37-104, Section 10317a provides that a member without dependents, in confinement in a guardhouse or brig pursuant to a court-martial by which he is acquitted, or the sentence is set aside or disapproved, is entitled to basic allowance for quarters during such period *provided he was in receipt of such allowance prior to the commencement of his confinement* or he was living in assigned government quarters prior to commencement of the confinement and such assignment was in fact terminated prior to the period of confinement, citing 40 Comp. Gen. 169 (1960) and 40 Comp. Gen. 715 (1961). This appears to be the correct rule. The question then is whether or not plaintiff was receiving BAQ prior to the beginning of his confinement on June 22, 1964. It is agreed by the defendant that plaintiff was receiving BAQ until June 19, 1964. On that date he was released to the Army by the civilian authorities. On June 22, 1964, plaintiff was assigned quarters and restricted to such quarters and several other buildings on the Fort Gordon Military Reservation, Fort Gordon, Georgia. Thus he was assigned bachelor quarters and confined on June 22, 1964, and no authorization for payment of BAQ as required by the regulations had been issued to him prior to such confinment. No doubt this was due to the fact that he had been furnished quarters and was not authorized to live off the post. The whole problem as to the plaintiff was well covered in a letter dated March 10, 1967, to Major Irving C. Hoag, Jr., from Frank H. Weitzel, Assistant Comptroller General, bearing identification No. B-160588, and attached to Defendant's Motion for Summary Judgment as Exhibit 5, where it is stated:

* * * * *

> At the time Captain Borys returned to Fort Gordon upon his release from civil authorities on June 19, 1964, no authorization for payment of basic allowance for quarters as required by paragraph 10311-g, Army Regulations 37-104, was furnished him presumably for the reason that he was furnished quarters or they were available for his occupancy and, as far as the record shows, he was not authorized to reside off the base. Therefore, the record does not provide any basis to conclude that at the time the orders of June 22, 1964, restricted him to the quarters assigned under those orders, he was entitled to a quarters allowance. Thus he had no entitlement to such an allowance to continue when he entered that restricted status. Neither is there any showing that adequate quarters were not available for his occupancy during the period he was restricted in the use of his assigned quarters and, of course, he was put to no personal expense for private quarters. Accordingly, at the time of his transfer to Fort Leavenworth Disciplinary Barracks under court-martial order dated January 23, 1965, he was not entitled to a quarters allowance and therefore during the period he was confined at Fort Leavenworth, he was not entitled to such an allowance.
>
> * * * * *

We conclude that the plaintiff is not entitled to a Bachelor's Allowance for Quarters during the period in question.[1]

[1] The plaintiff also included in his suit a claim for an amount equal to the surcharge he paid for meals furnished to him while confined by the military at Fort Leavenworth, Kansas. However, this claim has not been considered by the court because the parties announced at oral argument that they had reached an agreement for its settlement.

Accordingly, plaintiff's motion for summary judgment is denied, defendant's cross-motion for summary judgment is granted, and plaintiff's petition is dismissed.

DAVIS, *Judge*, concurring:

I join in the result and in all of the opinion except the portion which considers whether the period from June 19, 1964, to October 1, 1969, while plaintiff was confined by the military during the court-martial proceedings, should be credited for retirement purposes. The court correctly points out that it is unnecessary to consider this contention,[1] but discusses it nevertheless. I would pretermit the issue completely.

The first reason the opinion gives for not counting "the court-martial period" toward retirement seems to me quite wrong in a case, like this, in which the court-martial determination is entirely quashed (or the accused is acquitted). At least in those circumstances the period of confinement is "active duty" or "active service".

[1] To attain the necessary 20 years of creditable service for retirement, plaintiff needs to count both this period of civilian confinement and his period of military confinement. The court points out, for reasons with which I agree, why he cannot count the former. 38 COMP. GEN. 352 (1958) does say, broadly, that a commissioned officer can credit such absent time "for basic pay, retirement and other purposes"—apparently without regard to whether it was due to the officer's own misconduct. The Army has followed this ruling with respect to the computation of the rate of basic pay (paragraph 10106 of AR37-104), but there appears to be no similar regulation for computing retirement pay. For the latter, I would reject the General Accounting Office's general statement as incorrect and contrary to the purpose of 37 U.S.C. § 503(a) and the other legislation referred to in the court's opinion. Because of these (or comparable) provisions, enlisted men have long been forbidden to count such absent "misconduct" time for retirement. Without a specific statute or regulation on the point, there is no reason to continue to defer to the Accounting Office's irrational and merely historical distinction between officers and the enlisted ranks.

The second reason expressed by the court raises a difficult problem which we should let go until it has to be resolved. I am not at all sure whether the rule applicable to extended service for hospitalization or like purposes beneficial to the serviceman should apply where the man is held over for a court-martial, and is then acquitted or (as here) freed because there was no court-martial jurisdiction. In that situation the holding-over is not for the serviceman's benefit, and it may well be that he should be credited with the extra time he was forced to spend in the military for the unilateral purposes of the service.

NICHOLS, *Judge*, concurring:

The stipulation in this case shows that the Army excluded 4 years 8 months 21 days from its computation of active duty service for retirement purposes, calling it —at least the stipulation does—"civilian and military confinement". The whole amount of such confinement would have been almost a year longer and the figure used almost exactly equals the military confinement only, which started January 23, 1965, the first conviction or February 5, 1965, transfer to Disciplinary Barracks at Leavenworth, and ended September 22, 1969, plaintiff released, or October 1, 1969, plaintiff discharged. I conclude the Army allowed plaintiff the time of his civilian confinement as creditable service for retirement purposes in making its computation. Plaintiff calls attention in its "further brief" of February 20, 1973, to 38 Comp. Gen. 352 (1958) which seems to hold that an absent period of an officer due to his own misconduct, which would forfeit pay and allowances, nevertheless counts as creditable service for longevity pay and retirement. I would not take this too seriously except that defendant seems to have followed the same rule. The court and Judge Davis therefore may not be right in supposing that it is unnecessary, in adjudicating the claim for

retirement pay, to come to grips with the creditability of time spent by plaintiff in military confinement. I deem it well that Judge Skelton has considered the problem despite his belief it is unnecessary to do so.

As regards the service beyond the mandatory retirement date (January 1, 1965) not being creditable, I note again the position of the defendant was apparently not consistent with the court's. It is again anomalous to allow active duty pay for a periqd of confinement, as defendant has done here, and not allow credit towards retirement. Also, it would seem defendant should have back dated the honorable discharge to January 1, 1965, if it was going to take the position it takes here.

The facts are unique, and one hopes will remain so. I am not prepared on this record to repudiate the reasonable general rule Judge Skelton has fashioned, that a soldier does not perform "active duty" during a period of criminal confinement caused by his own misconduct, even if the confinement was illegal for reasons irrelevant to the soldier's guilt or innocence. If an innocent person was criminally confined, the Board for Correction of Military Records could correct the record to show "active duty" and no doubt would abuse its discretion if it refused.

The one sure thing is that plaintiff has not earned 20 year retirement. If stating just how he falls short requires some result-oriented jurisprudence, so be it. The law has been more than generous with Captain Borys and it is just not realistic to imagine any court is going to award him more.

10 U.S.C. § 101

Definitions

In addition to the definitions in sections 1-5 of title 1, the following definitions apply in this title:

* * * *

(22) "Active duty" means full-time duty in the active military service of the United States. It includes duty on the active list, full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned.

(23) "Active duty for a period of more than 30 days" means active duty under a call or order that does not specify a period of 30 days or less.

(24) "Active service" means service on active duty.

* * * *

(30) "Includes" means "includes but is not limited to".

* * * *

10 U.S.C. § 3926

Computation of years of service: voluntary retirement; regular and reserve commissioned officers

(a) For the purpose of determining whether an officer of the Army may be retired under section 3911, 3918, or 3924 of this title, his years of service are computed by adding—

(1) all active service performed as a member of the Army or the Air Force;

* * * *

10 U.S.C. § 3303

Commissioned officers: effect of failure of promotion to captain, major, or lieutenant colonel

(a) In this subtitle, "deferred officer" means a promotion-list officer considered for promotion to the grade of cap-

tain, major, or lieutenant colonel under section 3299 of this title, but not recommended for promotion.

(b) The years of service with which a deferred officer is entitled to be credited for promotion purposes shall be reduced so that one year after the date on which he would have been promoted had he been recommended by a selection board he will not have more than 7, 14, or 21 years of service, if in the grade of first lieutenant, captain, or major, as the case may be.

(c) A deferred officer shall be considered again by the next selection board considering officers of his grade and promotion list. If recommended by this board, his name shall be placed on the applicable recommended list with the other officers recommended by the board, in the same order among themselves as on the promotion list, but below officers placed on that list by an earlier board. If a deferred officer is promoted upon the recommendation of the next board considering officers of his grade, his first failure does not count as a failure of selection when he is thereafter considered for promotion to another regular grade.

(d) A deferred officer who is not recommended by the next selection board considering officers of his grade and promotion list shall—

(1) if he is eligible, be retired under section 3913 of this title;

(2) if he is not eligible for retirement under section 3913 of this title, but is eligible for retirement under any other provision of law, be retired under that law on the date when he would have been retired under section 3913 of this title if he were eligible, or

(3) if he is not eligible for retirement under section 3913 of this title or any other provision of

law, be honorably discharged on such date as may be requested by him and approved under regulations to be prescribed by the Secretary of the Army, but not later than the first day of the seventh calendar month after the Secretary approves the report of that board, with severance pay computed by multiplying his years of service, but not more than 12, computed under section 3927(a) of this title, by two months' basic pay of the grade in which he is serving on the date of his discharge. However, no person is entitled to severance pay under this section in an amount that is more than $15,000.

(e) For the purposes of subsection (d)(3), a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded. Aug. 10, 1956, c. 1041, 70A Stat. 188.

* * * *

37 U.S.C. § 503

Absence without leave or over leave

(a) A member of the Army, Navy, Air Force, Marine Corps, Coast Guard, or Environmental Science Services Administration, who is absent without leave or over leave, forfeits all pay and allowances for the period of that absence, unless it is excused as unavoidable.

* * * *

10 U.S.C. § 832

Investigation

(a) No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made. This investigation shall include inquiry as to the truth of the matter set forth in the charges, considera-

tion of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline.

(b) The accused shall be advised of the charges against him and of his right to be represented at that investigation by counsel. Upon his own request he shall be represented by civilian counsel if provided by him, or military counsel of his own selection if such counsel is reasonably available, or by counsel detailed by the officer exercising general court-martial jurisdiction over the command. At that investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after the investigation they shall be accompanied by a statement of the substance of the testimony taken on both sides and a copy thereof shall be given to the accused.

(c) If an investigation of the subject matter of an offense has been conducted before the accused is charged with the offense, and if the accused was present at the investigation and afforded the opportunities for representation, cross-examination, and presentation prescribed in subsection (b), no further investigation of that charge is necessary under this article unless it is demanded by the accused after he is informed of the charge. A demand for further investigation entitles the accused to recall witnesses for further cross-examination and to offer any new evidence in his own behalf.

(d) The requirements of this article are binding on all persons administering this chapter but failure to follow them does not constitute jurisdictional error.

Army Regulation 37-104

"Chapter 1. *Service Creditable For Basic Pay.*
(¶10101-10201)

• • •

10106. Effect of Absence from Duty on Creditable Service.

a. Absence While in Officer Status.

C 2
22 Oct. 65

Authorized or unauthorized absence which occurs while a member is in a commissioned or warrant officer status is counted as creditable service. Absence because of sickness due to misconduct or because of confinement while awaiting trial, as distinguished from enlisted members under similar circstances, is counted as creditable service. See 38 Comp. Gen. 352."

• • •

38 Comp. Gen. 352

Military Personnel—Pay—Service Credits—Absences Due to Misconduct, Etc.—Officers

Commissioned and warrant officers who lose time from active duty because of sickness due to their own misconduct, absence without leave or absence because of confinement while awaiting trial, as distinguished from enlisted members absent under similar circumstances, may not, in the absence of additional legislation, have such lost periods excluded from determinations of creditable service for basic pay, retirement and other purposes.

To the Secretary of Defense, November 7, 1958:

Reference is made to letter of July 22, 1958, with enclosures from the Assistant Secretary of Defense (Comptroller), requesting our decision as to whether periods of unauthorized absence in excess of one day may be included in determining creditable service of commissioned officers, commissioned warrant officers, and warrant officers for basic pay, retirement and other purposes.

The specific question upon which decision is requested are set out in Committee Action No. 209 of the Military Pay and Allowance Committee, Department of Defense, as follows:

> 1. May commissioned officers, commissioned warrant officers, and warrant officers, in determining creditable service for basic pay, retirement and other purposes, include the following periods?
>
> a. Absence from his regular duties for a continuous period of more than one day because of intemperate use of alcoholic liquor or habit-forming drugs, or because of disease or injury resulting from his misconduct?
>
> b. Absence without leave in excess of one day or in a desertion status?
>
> c. Absence because of confinement for more than one day while awaiting trial and whose conviction has become final?
>
> d. Absence because of confinement for more than one day while awaiting trial or disposition of the case and the member is released without trial or acquitted?

2. Would the answer to questions *c* and *d* above be the same if confinement is effected under provisions of U.C.M.J., Article 14?

3. Would the answer to questions *1* and *2* be the same in those cases where the absence is administratively excused as unavoidable?

Section 202 (a) of the Career Compensation Act of 1949, 37 U.S.C. 233, provides that in computing the cumulative years of service to be counted by members of the uniformed services for determining the amount of basic pay they are entitled to receive upon completion of such years of service, members shall be credited with full time for all periods of active service as a commissioned officer, commissioned warrant officer, warrant officer, and enlisted person in any regular or reserve component of the uniformed services, and full time for all periods during which they were enlisted or held appointments as commissioned officers, commissioned warrant officers or warrant officers in any of the regular or other named components of the uniformed services.

In 22 Comp. Gen. 759, we held that, under the provisions of the act of December 2, 1942, 56 Stat. 1037, 37 U.S.C. 101 (1946 Ed.), authorizing officers to count for longevity pay purposes "full time for all periods during which they were enlisted," officers may not count time lost, while previously serving as enlisted men, on account of sickness due to their own misconduct, absence without leave, absence over leave, or nonperformance of duty because of imprisonment. In that decision we said:

> * * * Longevity pay generally has been considered as an increase granted for honest and faithful service on the basis that the serviceman by honest and faithful performance of his duties has fitted himself better for the performance thereof and has made himself more valuable to the Government. While

> the present statute does not restrict the service which may be counted to active service but permits the inclusion of periods in an inactive status as a reservist, or otherwise, when the man was subject to call for active duty and presumably held himself in readiness to serve, it would be contrary to the whole spirit and purpose of such provisions were he to receive the benefits thereof by counting periods when he was not ready to serve because he had deliberately absented himself from duty without authority or because he was physically unable to perform his duties by reason of his own misconduct. In the absence of express language clearly authorizing the inclusion of periods of that character, such an intention may not be imputed to the Congress. Moreover, in view of the long period of time during which the rule stated above has been in effect with regard to enlisted men, it must be considered that Congress was cognizant thereof, and in enacting the provisions contained in section 3 of the act of December 2, 1942, without expressly providing that such service should be counted, intended that the established rule in that respect would still apply. * * *

As there indicated, that decision was based on the long-standing rule that enlisted men could not count such service for longevity pay purpose. A different rule, however, long had been followed with respect to officer service. See 3 Comp. Gen. 825. Presumably the fundamental basis for the difference in rules was that the related absences were by law excluded in determining when an enlistment was completed and there was no comparable statutory provision applicable to officers.

It appears from 7 Digest of Opinions of the Judge Advocates General of the Armed Forces, Pay and Allowances,

section 21.3, that the Judge Advocate General of the Army has viewed 22 Comp. Gen. 759, in conjunction with 36 Comp. Gen. 355, as suggesting that the rule now is the same for officers and enlisted members. In the latter decision we stated that Filipino members of the Army

> * * * are entitled to count the periods, in computing length of service for pay purposes, during which they retained their status as enlisted men or officers and were not absent without authority or in a status requiring them to make up the lost time, even though they were "paroled" by the enemy and returned to their homes. Compare 22 Comp. Gen. 759 and 30 Comp. Gen. 285 holding that a period while on leave without pay may be counted in determining the length of service for pay purposes.

In none of those decisions, however, was there directly involved the question whether absences of officers in the circumstances related in the present questions may be credited for longevity pay or retirement purposes. We agree that what was said in 22 Comp. Gen. 759 logically should be applied with respect to service as an officer, but it is our view that legislation would be required to change the long-standing rule as to officer service. While the trend of legislation in recent years generally has been to provide equal treatment for officers and enlisted members of the Armed Forces, we do not perceive in the applicable statutes a sufficient basis to warrant a change in the different existing rules applicable to officers and enlisted members in the related circumstances. Adoption of a uniform rule for all classes of service personnel would, in effect, be legislating. Accordingly, we hold that under existing law officer personnel may be credited with periods of absences under the related circumstances for longevity and retirement purposes, and all the questions are answered in the affirmative.

SUPREME COURT, U. S.

FILED

OCT 2 1973

MICHAEL RODAK, JR., CLERK

No. 73-266

In the Supreme Court of the United States

OCTOBER TERM, 1973

STEPHEN J. BORYS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
IRVING JAFFE,
Acting Assistant Attorney General,
ROBERT E. KOPP,
ANTHONY J. STEINMEYER,
Attorneys,
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Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-266

STEPHEN J. BORYS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. A1-A17) has not yet been reported.

JURISDICTION

The judgment of the Court of Claims was entered on May 11, 1973. The petition for a writ of certiorari was filed on August 9, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTIONS PRESENTED

1. Whether petitioner, a former Army officer, is entitled to military pay for the period of his active duty during which he was incarcerated by civilian authorities on serious criminal charges.

2. Whether petitioner is eligible for retirement benefits when, to attain the necessary 20 years of active service, he must include the periods of his confinement

by civilian and military law-enforcement authorities on account of his criminal misconduct.

STATEMENT

According to the agreed statement of facts (Pet. 3-7), petitioner enlisted in the Army on March 21, 1949, and was commissioned as a second lieutenant on September 23, 1949. On June 25, 1963, while on leave, petitioner was arrested by civilian police in Georgia and later transferred to civilian authorities in South Carolina, where he was twice tried and acquitted by a state court. Upon his release from civilian confinement on June 19, 1964, petitioner was returned to military control. On June 22, 1964, he was restricted to certain areas of his Army post pending an investigation under Article 32 of the Uniform Code of Military Justice, 10 U.S.C. 832, which led to a general court-martial. Some but not all of the offenses under investigation were the same as those charged against petitioner by the civilian authorities (Pet. App. A8).

On January 23, 1965, petitioner was convicted by court-martial of two rapes, one attempted rape, three robberies, five sodomies, one attempted sodomy, and one larceny.[1] He was sentenced to dismissal from the service, forfeiture of all pay and allowances, and confinement at hard labor for 60 years (Pet. 5). The conviction was set aside by the Army's Board of Review. Following a second court-martial, petitioner was again convicted on August 2, 1966, of the same offenses

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[1] Def.'s Exh. 1-D, appended to Defendant's Reply to Plaintiff's Response to Defendant's Cross-Motion for Summary Judgment, filed in the court below. Petitioner's offenses are described in more detail in the opinion of the court below (Pet. App. A7-A8).

except for the larceny charge,[2] and was given the same sentence as before. The Army Board of Review affirmed this conviction but reduced the confinement to 30 years' hard labor (Pet. 5).

On September 5, 1969, the United States Court of Military Appeals reversed petitioner's conviction. *United States* v. *Borys*, 18 U.S.C.M.A. 547, 40 C.M.R. 259. That court held that *O'Callahan* v. *Parker*, 395 U.S. 258, required dismissal of all military charges against petitioner because his "horrible acts" and "vicious and depraved conduct" (18 U.S.C.M.A. at 549, 40 C.M.R. at 261) had not been service-connected. Petitioner was released from military confinement and returned to active duty on September 22, 1969 (Pet. 5-6).

On October 1, 1969, petitioner was honorably discharged from the Army pursuant to 10 U.S.C. 3303, which requires the retirement or discharge of any officer who has been twice passed over for promotion to certain ranks. Petitioner had been passed over for promotion to major in 1963 and again in 1964 (Pet. 3, 4). For this reason, he had been notified in July 1964 that he was to be honorably discharged on January 1, 1965, but had been retained in the service pursuant to 10 U.S.C. 803, because of the court-martial charges then pending against him (Pet. 5).

Upon petitioner's discharge, the Army computed his active service for retirement purposes as follows (Pet. 6):

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[2] See Def.'s Exh. 1-B, appended to the Reply Memorandum cited in note 1, *supra*.

	Years	*Months*	*Days*
Net Service This Period	15	3	19
Other Service	4	8	21
Total	20	0	10
Total Active Service	15	3	19

Petitioner objected to this computation and sought retirement benefits based upon service of 20 years, 10 days. He also sought military pay and allowances for the period of his civilian confinement, together with other relief not pursued in this Court (Pet. App. A1).

After the Army Board for the Correction of Military Records denied relief (Pet. 7), petitioner brought this action in the Court of Claims. The court granted summary judgment for the government. It first held that the period of petitioner's civilian confinement could not be credited for either pay or retirement purposes (Pet. App. A3-A11). Then, although finding it unnecessary to reach the issue, the court also reasoned that petitioner was precluded from obtaining retirement credit for his period of military confinement (Pet. App. A11-A12).

ARGUMENT

The decision of the Court of Claims is correct, and there is no reason for further review.

1. Petitioner is not entitled to military pay for the period of his civilian confinement, because his absence from duty was not excused as unavoidable. Pursuant to 37 U.S.C. 503, a "member of the Army * * * who is absent without leave or over leave, forfeits all pay and allowances for the period of that absence, unless it is excused as unavoidable." The applicable regulation, AR 37-104, § 12122 (Pet. App. A5), provides that "regardless of the outcome of the civil proceedings," an absence because of civilian confinement is not necessarily

unavoidable. This regulation is in accord with the Comptroller General's ruling that "the basis for excusing absences should be an absence of misconduct rather than a lack of criminal culpability" (39 Comp. Gen. 781, 783). Under this criterion, the Army determined that petitioner's absence was not unavoidable because it was due to his own misconduct (Pet. 7). The Court of Claims correctly held that on the facts of this case that determination was not arbitrary or capricious, and was supported by substantial evidence (Pet. App. A8).

2. Petitioner's claim for retirement benefits also lacks merit. Eligibility for such benefits requires at least 20 years of service (10 U.S.C. 3911). Years of service include "all active service performed as a member of the Army" (10 U.S.C. 3926). The total time between petitioner's enlistment (March 21, 1949) and discharge (October 1, 1969) was 20 years, 6 months, and 10 days.[3] Of this period, petitioner was in civilian confinement for 11 months, 24 days (June 25, 1963, to June 19, 1964) and in military confinement for 5 years, 3 months (June 22, 1964, to September 22, 1969). Thus, if either period of confinement is excluded, petitioner's creditable service is reduced to less than the necessary 20 years.

The Court of Claims correctly concluded that both periods of confinement must be excluded in determining eligibility for retirement benefits. During his civilian confinement, petitioner performed no military duties and, as discussed above, is entitled to no military pay,

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[3] The record does not indicate why 6 months of this total time was disregarded in arriving at the figure 20 years, 10 days, for petitioner's "total active service" (Pet. 6). Petitioner, in any event, only claims 20 years, 10 days of service (see Pet. 6-7).

because his absence from duty was not excused. Although a decision of the Comptroller General authorizes retirement credit for the period that an officer is in civilian confinement, 38 Comp. Gen. 352, that decision is contrary to the purpose of 37 U.S.C. 503 (quoted *supra*, p. 4) and makes an indefensible distinction between officers and enlisted men (see Judge Davis's concurring opinion, Pet. App. A15).[4] Accordingly, petitioner's period of civilian confinement must be excluded in determining his eligibility for retirement benefits.[5]

Similarly, petitioner's period of military confinement was properly excluded for retirement purposes. As the Court of Claims noted (Pet. App. A11), petitioner did not perform service in the active military service during this period. The Court of Military Appeals clearly

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[4] Apparently, at least part of petitioner's civilian confinement was included in the 15 years, 3 months, and 19 days of net service which the Army credited to petitioner for retirement purposes. The period of 4 years, 8 months, and 21 days of "other service" which the Army excluded for retirement purposes corresponds to the period between petitioner's originally specified mandatory discharge date (January 1, 1965) and his release from military confinement (September 22, 1969) (see Pet. 7; but see Pet. App. A16). Thus, although the agreed statement of facts provides that "[t]he Army designated 4 years, 8 months and 21 days of plaintiff's civilian and military confinement as 'other service' and excluded same from the computation of total service creditable to plaintiff" (Pet. 6), in fact, the "other service" was apparently the period of petitioner's military confinement subsequent to the date which, but for the pending court-martial charges, he would have been discharged for having been twice passed over for promotion.

[5] Petitioner also contends (Pet. 15) that AR 37-104, § 10106, requires that his civilian confinement be credited for retirement purposes. The Court of Claims correctly observed (Pet. App. A9, A15), however, that this provision pertains only to basic pay, not retirement pay.

indicated that its reversal of petitioner's conviction was not based upon any doubts as to the correctness of the court-matial's findings of guilt. No purpose of the retirement benefits program, therefore, could be fostered by awarding creditable service for petitioner's period of military confinement.

Moreover, the Army properly determined that the portion of this confinement after January 1, 1965, could not be included in any event. But for the court-martial charges then pending against petitioner, he would have been discharged no later than that date pursuant to the mandatory provisions of 10 U.S.C. 3303 because he had twice been passed over for promotion. It is settled that service beyond a serviceman's mandatory release date cannot be credited for retirement purposes. *Richard* v. *United States,* 152 F. Supp. 433 (Ct. Cl.); 43 Comp. Gen. 742; 41 Comp. Gen. 375. Cf. *O'Callahan* v. *United States,* 451 F. 2d 1390 (Ct. Cl.).[6]

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[6] *Bell* v. *United States,* 366 U.S. 393, relied upon by petitioner (Pet. 8-10), is not in point. There, enlisted men were held to be entitled to pay and allowances during the period that they were prisoners of war in North Korea despite their collaboration with the enemy. The controlling statute in *Bell* was 37 U.S.C. (1958 ed.) 242, which required that any serviceman captured by the enemy be accorded "the same pay, subsistence, and allowance to which he may be entitled while in the actual service of the United States * * *." There is no similar requirement here with respect to those retained beyond their normal mandatory retirement date because of pending court-martial charges. Moreover, this Court expressly declined to decide in *Bell* whether "the Secretary of the Army was wholly without power under the statute to determine administratively that the petitioners after their capture were no longer in active service" (366 U.S. at 412). In the present case, the Army's determination that the time spent by petitioner in military confinement cannot be credited as active service for retirement purposes is consistent with the decisions of the Court of Claims and Comptroller General cited in the text.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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